United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-7163

ORIGINAL WITH PROOF OF SERVICE

To be argued by
SAMUEL K. ROSEN

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

LEO M. SHORE,

Plaintiff-Appellant,

vs.

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMEKH, HERBERT N. SOMEKH, as Trustee of trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE,

Defendants.

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

PARKLANE HOSIERY COMPANY, INC. and HERBERT N. SOMEKH,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

LEO M. SHORE,

Plaintiff-Appellant,

v.

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMEKH, HERBERT N. SOMEKH, as Trustee of trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE,

Defendants,

PARKLANE HOSIERY COMPANY, INC. and HERBERT N. SOMEKH,

Defendants-Appellees.

Docket No. 77-7163

- X

APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

The relevant facts on this appeal are discussed in this appellant's main brief, and will not be repeated herein.

The purpose of this brief will be, primarily, to discuss issues raised in the answering brief of the defendants-appellees, which may not be fully addressed in plaintiff-appellant's main brief.

ARGUMENT

POINT I

APPELLEES' BRIEF MISAPPREHENDS THE RELATIONSHIP BETWEEN THE COMMON LAW AND THE SEVENTH AMENDMENT.

Appellees' answering brief analyzes the relationship between the Seventh Amendment and the common law doctrine of collateral estoppel in a completely erroneous manner and reaches an incorrect conclusion as to that relationship. Appellees' brief contends that in 1791, collateral estoppel could only apply where there was mutuality of estoppel and that without mutuality, collateral estoppel could not apply since that would cause a loss of a jury trial right (p. 15). Then making an unwarranted projection of the 1791 common law to the contemporary legal world, appellees' brief reaches the erroneous conclusion that, since plaintiff here was not a party to the prior SEC action, to grant collateral estoppel effect here to factual determinations in that case somehow deprives them of a jury trial right (p. 16).

This argument is fatally flawed for two reasons. First, it incorrectly disregards the specific language of the Seventh Amendment which states that the jury trial right shall be preserved "in Suits at common law" and does not relate to an amorphous jury trial right. Second, it incorrectly assumes that the Seventh Amendment relates to a static common law, frozen eternally as it was in 1791.

The Seventh Amendment states that the right of trial by jury shall be preserved "in Suits at common law." It does not refer to an amorphous, inchoate jury trial right, as appellees seem to believe, but to a right of jury trial in specific suits. That right, contrary to appellees' contention, has been eliminated in certain suits in which it existed in 1791 - namely those suits in which a party, who was not involved in the prior suit, has been permitted to affirmatively use, in a subsequent suit, fact determined in that prior suit, by the doctrine of collateral estoppel. Suits in which the extension of this doctrine has been approved are numerous and encompass many areas of the law. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) (patent validity); Azalea Drive-In Theatre, Inc. v. Hanft, 540 F.2d 713 (4th Cir. 1976), cert. denied, 45 U.S.L.W. 3635 (March 31, 1977) (promissory note); Garcy Corp. v. Home Insurance Company, 496 F.2d 479 (7th Cir. 1974) (insurance); Humphreys v. Tann, 487 F.2d 666 (6th Cir. 1973) (airplane crash); Skrzat v. Ford Motor Company, 389 F. Supp. 753 (R.I. 1975) (personal injury); Michini v. Rizzo, 379 F. Supp. 837 (E.D. Pa. 1974) (civil rights); 1 B Moore's Federal Practice, ¶0.441 [2] (2d Ed. 1974) and cases cited therein. The instant case is simply another action in which one who was not a party to a prior suit should be permitted to affirmatively use the doctrine of collateral estoppel to estop parties to deny facts determined against them in a prior proceeding.

The basic policy consideration behind the extension of the doctrine is clear.* Justice White writing for a unanimous Supreme Court in Blonder-Tongue (which was decided one year after Rachal v. Hill,** 435 F.2d 59 (5th Cir. 1970), cert. denied, 403 U.S. 904 (1971)) stated the basic consideration for the extension of the doctrine by inquiring ". . . whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." Blonder-Tongue at 328. Clearly in the instant case there has been a "full and fair opportunity" for judicial*** resolution of the issues upon which plaintiff is seeking a summary judgment and the doctrine of collateral estoppel precludes their re-trial and dictates the granting of plaintiff's motion.

The second fatal flaw in appellees' argument is that it incorrectly assumes that the Seventh Amendment relates to a static common law, frozen as of 1791. What Blonder-Tongue and its progeny make clear is that the Seventh Amendment's preservation of jury trial rights in suits at common law is to be viewed in the light of a changing and viable common

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* See also pp. 10-18 infra for additional policy considerations.

** The appellees heavily rely on Rachal. However, Rachal itself accepted the fact that mutuality was no longer required by federal law. Id. at 62.

*** The Supreme Court in Blonder-Tongue did not limit the fact-finder to a jury in its inquiry, but referred to a judicial determination, thus including fact-finding by either the court or a jury.

law which is constantly being molded by the courts in an effort to meet contemporary needs and not those of 1791. Appellees' contention that in analyzing the Seventh Amendment's requirements, this Court must take the common law as it was in 1791 is clearly incorrect. Were this Court to adopt appellees' argument, it would deprive parties of jury trials in all actions brought under the securities laws and all other statutes enacted after 1791, since (a) such statutes were not in existence in 1791 and, therefore (b) they were not suits at common law in which the right of jury trial was protected. This is the obviously absurd logical result of appellees' argument that this Court must freeze for all time the common law as of 1791. To accept this argument would be to severely reduce the right to jury trial, not, as appellees erroneously contend, to enlarge it.

It is the genius of the framers of the Seventh Amendment that the living common law can grow within the framework of the Seventh Amendment and adapt to contemporary times. Appellees' argument destroys that concept and would have this Court fossilize something as alive today as it was in 1791.

The cases which have permitted the use in a subsequent action of the collateral estoppel doctrine by parties not involved in the prior action have clearly recognized that the common law could grow within the basic structure of the

Seventh Amendment. It is respectfully submitted that that growth includes the case here presented and that plaintiffs' motion for summary judgment should be granted.

POINT II

APPELLEES' BRIEF AND THE RACHAL COURT COMPLETELY MISINTERPRET THE AUTHORITIES ON WHICH THEY ARE PURPORTEDLY BASED AND REACH AN INCORRECT CONCLUSION ON THE RIGHT TO A JURY TRIAL

Appellees' brief and the Rachal court completely misinterpret the authorities on which their analyses are based, Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); and (as to appellees' brief) Meeker v. Ambassador Oil Corp., 375 U.S. 160 (1963), rev'g mem. 308 F.2d 875 (10th Cir. 1962), and reach incorrect conclusions. In each of these three cases, there were common issues to be determined in one suit in which both legal and equitable claims were made. What the Supreme Court decided in those cases was that the common issues to be determined had to be heard first by the jury. As the Court stated in Dairy Queen, 369 U.S. at 472, Beacon Theatres was limited to the presentation of legal and equitable issues in a single case.

Appellees' brief stresses the fact that Beacon Theatres forbids, save under the most imperative circumstances, loss of a right to jury trial on legal issues

through prior determination of equitable claims (p. 21). What appellees do not inform this Court is that they are quoting from the middle of a paragraph, a paragraph which begins with the words:

> "If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes...." Beacon Theatres at 510. (Emphasis added)*

Obviously the citation by appellees is governed by this language. Where legal and equitable causes arise in the same suit it is only then that under the most imperative circumstances should the equitable cause be tried first. The explicit language of the court, not cited by appellees, makes it clear that the instant case is not within the jury trial preservation there discussed.

The reason for the holdings in these cases is obvious. Where it is within the power of the court to avoid preclusion of a jury adjudication of issues common to both legal and equitable claims by scheduling the hearing of those issues by the jury first, the court should do so. That is as far as Beacon Theatres goes. Dairy Queen, supra at 472.

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* See plaintiffs' main brief at p. 18.

In Rachal, the court recognized that a Beacon Theatres-type factual situation was not present by stating it had found no case "directly in point." Rachal, 435 F.2d at 64. That court also understood Beacon Theatres to be limited to cases in which legal and equitable claims were simultaneously made by stating that the Supreme Court had there noted:

> " . . . [I]f the equitable issues were tried first the doctrine of res judicata would most likely precludue further litigation of the same issues in the subsequent proceedings before a jury . . ." Rachal, supra, at 64. (Emphasis added)

Inexplicably, the Rachal court then relied upon Beacon Theatres in deciding against the plaintiff, even though it understood that case to mean that there would be a preclusion of a subsequent determination as to facts which were determined by a court in a prior proceeding. Thus the Rachal decision is incorrect not only for policy reasons, but because of its improper reliance on the alleged precedents for its incorrect conclusion.*

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* Numerous articles which have discussed Rachal criticize it as improperly analyzing the precedents on which it purports to rely and as internally inconsistant. See, e.g., McWilliams, "Federal Antitrust Decrees: Should They Be Given Conclusive Effect in Subsequent Private Action?" 48 Miss. L.J. 1, 20-28 (1977); Comment, "The Use of Government Judgments in Private Antitrust Litigation: Clayton Act, Section 5(a), Collateral Estoppel, and Jury Trial," 43 U. of Chi. L. Rev. 338 (1976) (hereinafter "Chicago Comment"); Note, "Right to Jury Trial in Civil Actions - Crane Co. v. American Standard, Inc., 490 F.2d 332 (2d Cir. 1973)," 41 Brklyn. L. Rev. 911, 956-958 (1975); Comment, "The Effect of SEC Injunctions in Subsequent Private Damage Actions - Rachal v. Hill," 71 Col. L. Rev. 1329 (1971) (hereinafter "Columbia Comment").

The cases cited by appellees (p.10) while some are readily distinguishable not only on the facts, but on traditional res judicata and collateral estoppel analysis, since they rely on Rachal, are likewise incorrect.

The Meeker decision, so heavily relied on by appellees, adds nothing to Beacon Theatres but merely restates the fact that, if in a lawsuit, common issues are present which relate to both legal and equitable claims, the jury must hear the common issues first to avoid the preclusion of a jury trial because of collateral estoppel. Meeker, a per curiam decision, is thus nothing more than a restatement of Beacon Theatres.

Meeker, moreover, reinforces appellant's contention that a judgment in an equitable proceeding can estop relitigation of the same facts in a subsequent legal action, because were it not for the foreclosure effect of the prior equitable judgment the Court would not have troubled reordering the sequence of the hearings. See Chicago Comment. See also, Katchen v. Landy, 382 U.S. 323, 338-339 (1966); Crane Co. v. American Standard, Inc., 490 F.2d 332, 342 (2d Cir. 1973). The perplexity manifested, therefore, in appellees' brief as to why Meeker was "inexplicably ignored in the Shapiro and Coquillette article * and plaintiffs' brief" (p. 26) is therefore hard to comprehend. ** Even more difficult to comprehend is the astonishing suggestion in appellees'

* Shapiro and Coquillette, "The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill," 85 Harv. L. Rev. 442 (1971).

** One could also ask why it was ignored by the Rachal court, if it is so important, since Meeker was decided seven years before Rachal.

brief that when the decision in Crane, supra, was written, this Court had not been apprised of Meeker (p. 29). In so many words appellees contend that this Court was unaware of the law when it rendered that decision. Surely, this is nothing more nor less than an unwarranted and presumptuous derogation of this Court's ability.

POINT III

POLICY CONSIDERATIONS, COMPLETELY IGNORED BY APPELLEES' BRIEF, REQUIRE CONDEMNATION OF THE RACHAL DECISION

In the Columbia Comment, numerous policy considerations are suggested and analyzed which demonstrate the incorrectness of the Rachal holding. Accord, Chicago Comment, supra, p. 8, footnote.

First, the Columbia Comment indicates the strong policy arguments in favor of applying the doctrine of collateral estoppel here, based upon a prior SEC injunction action, which were not present in Beacon Theatres.*

> The courts have consistently recognized the need for private actions to insure effective enforcement of the securities laws. They are a private policing weapon supplementing governmental action. The desirability of promoting the use of that weapon is underscored by the questionable efficacy of relying solely upon governmental enforcement measures.
>
> * * *

* See also plaintiffs' main brief at pp. 25-27.

> It appears to follow from this important function of private suits and from the amount of government energy and expense utilized in securing SEC injunctions that a misdirection of efforts would result if the private plaintiff were not able to derive significant benefit from a successful SEC action.
>
> The value of utilizing the original Commission action in subsequent private tests is underlined by the fact that, employed in isolation from other measures, the SEC injunction suit may often have only a limited effect. When the Commission brings a court action for injunctive relief, the after-the-fact nature of the decree brings into question its practical effect, particularly in the area of misrepresentation and collusion under rule 10b-5. As Judge Friendly pointed out in SEC v. Texas Gulf Sulphur Co., an injunction is not an effective remedy for dealing with a scheme like that in Rachal v. Hill, because the violation is normally a once-in-a-lifetime occurrence. Id. at 1336-1337. (Emphases added.) (Footnotes omitted.)

In weighing these policy goals suggested by the Columbia Comment, it is respectfully submitted that this Court consider that although Judge Duffy found material omissions from the subject Proxy Statement (A 91-96) and found that such material omissions were knowing (A 99), he did not believe that in the instant circumstances an

injunction was warranted (A 97-99).* Instead of an injunction he looked to this suit, inter alia, to redress the harm inflicted on the class by the appellees (A 98). Clearly, the policy considerations enunciated in Columbia Comment in favor of applying collateral estoppel are therefore that much more meaningful in the instant case.

Columbia Comment next considers certain policies underlying the collateral estoppel doctrine -- namely certainty and finality of litigation, assuring each party of his right to be heard on a particular issue and judicial economy in the face of wholly unmanageable

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* It should be noted in passing that the decision of Judge Duffy has been appealed. The fact of the appeal, however, is irrelevant to the instant case. The appeal does not detract from decisiveness and finality of the district court judgment and Judge Duffy's decision stands as res judicata and is entitled to collateral estoppel effect. Huron Holding Corp. v. Lincoln Mine Operating Co., 313 U.S. 598 (1941); United States v. Nysco Laboratories, 215 F. Supp. 87, aff'd, 318 F.2d 817 (2d Cir. 1963); IB Moore's Federal Practice ¶0.416[4]. If Judge Duffy is reversed, FRCP 60(b)(5) permits a party to move for relief from a judgment when a prior judgment on which it is based is reversed. The appropriate procedure, therefore, is to grant collateral estoppel effect and permit the losing party to move for relief, if necessary, after the outcome of the appeal. Nysco Laboratories, supra.

court calendars.*

Clearly appellees have a full and fair opportunity to have the facts underlying the instant action and the SEC action judicially determined (Plaintiff's main brief at pp. 5-7)** Furthermore, as Columbia Comment indicates, another criterion for determining unfairness was suggested by Judge Learned Hand in The Evergreens v. Nunan, 141 F.2d 927 (2d Cir.), cert. denied, 323 U.S. 720 (1944). That standard was the foreseeability of subsequent actions at

* Appellees' brief makes the astonishing contention that judicial economy would not be served by granting plaintiffs' motion (p. 39). Plaintiffs' counsel has stated to Judge Wyatt that they would consent to dropping the other defendants if this motion is granted. They have so stated in the Petition for Permission To Appeal (p. 8).

Further, appellees contend that further issues would remain to be litigated even if liability against appellees were determined. It is beyond argument, however, that any required trial in which liability is not an issue must be shorter than one in which it is not.

** Appellees' brief (p. 9, n. 8), states that federal law governs the right to jury trial in federal court and as a result, plaintiff's remarks regarding state law principles of collateral estoppel are wrong. This suggestion misreads plaintiff's contention. First, as demonstrated in plaintiff's papers submitted on this appeal, under federal law plaintiff is entitled to summary judgment. Plaintiff also alleges pendent state law claims. Were the federal claims removed from the action, leaving only the pendent claims, federal principles of collateral estoppel would not necessarily apply. Since state laws as to collateral estoppel must be applied in federal court, plaintiff accordingly looked to New York law to ascertain its estoppel principles. See, Wright, Miller & Cooper, Federal Practice and Procedure, Interim Pamphlet to Jurisdiction and Related Matters, § 138 at 224-225 (1977). The test, as enunciated by the District Court for the Southern District of New York in Ritchie v. Landau, 475 F.2d 151 (2d Cir. 1973), is the full and fair opportunity test as in federal law. The fact is that under both state and federal law, appellees who have already had, and lost, a trial on the merits, have had a full and fair opportunity to be heard and are therefore not entitled to a second full trial on the merits.

the time of the commencement of the first suit. In Rachal, the private action was commenced after the SEC began its injunction proceeding. In the instant action, plaintiff began his suit, based on the same subject matter as the SEC action, over a year before* the SEC injunction proceeding began. Clearly, there would be no unfairness in applying the collateral estoppel doctrine here.

As the Columbia Comment further notes:

> "In addition, the idea that the denial of a jury trial in Rachal would be unfair to the defendant appears rather questionable. As previously noted, the circumstances in Beacon Theatres did involve an apparent injustice in that the defendant was required both to assert his claim and to waive his jury trial by virtue of the compulsory counterclaim. The defendant in Rachal, however, having had a non-jury hearing on the issue of liability, was presumably raising the jury issue, not for the purpose of assuring a hearing before a jury, but simply in order to get a second trial of the same issue. Given the fact that jurors are often small investors and, even if not, may well sympathize with an allegedly defrauded plaintiff as against an accused swindler, it is not likely that a party accused of violating the securities laws by defrauding public investors would, given the choice, favor a jury trial. Thus its unavailability in this instance does not suggest that the defendant is being unjustly treated." Columbia Comment at 1339-1340. (Emphasis added.) (Citations omitted.)

The Columbia Comment concludes with certain alternatives to the apparent quandary in which the Rachal court found itself in

*Plaintiff wishes to note, merely in passing, that contrary to appellees' suggestion (p. 4), this action has been actively prosecuted since its inception. Plaintiff has, inter alia, actively sought discovery, has been thwarted numerous times in its efforts to take oral depositions and has received and analyzed extensive documents.

reconciling the application of collateral estoppel with its reading of the Seventh Amendment.*

What the Columbia Comment makes clear is that Rachal, a case recognized to be unprecedented by the Court which decided it, resulted in an unwarranted extension of the Beacon Theatres doctrine into a factual situation which was outside the scope of that decision. When the arguments presented in the Columbia Comment are added to those herein and plaintiffs' main brief, it becomes clear that Rachal was incorrectly decided and should not be adopted by this Court.

Further policy considerations are enunciated in the Chicago Comment. The author therein claims that to guarantee a second trial on the factual issues as Rachal does, not only leads to obvious diseconomies, but, inter alia, (a) will give plaintiffs an incentive not to join defendants with related claims but which seek different relief; and (b) logically extends to cases involving the same two parties, as well as where the party seeking to use collateral estoppel was not a party to the first action. The result of this would substantially erode the doctrine not only of collateral estoppel, but also of res judicata. Id. at 371-372.

These considerations obviously generate duplicative litigation and are contrary to the purpose and function of

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* The Columbia Comment, although not absolutely condemning Rachal and finding it "not indisputably wrong" (at 1344), makes it clear that the policy considerations in a Rachal-type situation are stronger in deciding for the plaintiff than for the defendant who has lost in a prior adjudication.

many of the Federal Rules of Civil Procedure.

Moreover, the suggestion by appellees that federal policy absent the Seventh Amendment requires a readjudication of the issues already decided by Judge Duffy is completely inconsistent with existing policy and law. The defendants place great reliance on McCook v. Standard Oil of California, 393 F. Supp. 256 (C.D. Calif. 1975). The Court therein, citing Rachal, denied collateral estoppel effect to a prior adverse antitrust judgment obtained in federal court by the Justice Department to a private plaintiff who brought a private antitrust action based on the same facts as those decided in the case brought by the Justice Department.

The McCook court held that the defendants were entitled to relitigate the previously determined issues to a jury. The premise on which the Court relied was its interpretation of the public policy in favor of jury trials. The soundness of this ruling has been questioned in Chicago Comment:

> The court's opinion rests on the dubious assumption that there is a public policy favoring jury trials emanating from the seventh amendment, but nevertheless independent of it and ignores that as a historical matter this

policy has been inextricably bound with the seventh amendment.* Id. at 373.

Moreover, the authors argue that the claim, made by the appellees herein, that extraneous to the requirements of the Seventh Amendment, the appellees are entitled to a re-determination of the issues, is unjustified on policy grounds.

> Where there is no constitutional right to a jury trial, moreover, it is difficult to justify imposing such a right on policy grounds. When a private antitrust plaintiff follows a successful government judgment, the policy justifications for allowing the defendant to relitigate issues . . . are tenuous at the best. The McCook court asserts that it would be unjust to estop the defendant from relitigating his liability in this situation. But it is hard to understand what would be unjust about estopping the defendant relitigating issues which he already has had a full and fair opportunity to litigate. Id. at 372. (Emphasis added).

To require that appellees be granted a second opportunity to be heard implicitly undermines the nature of collateral estoppel and insults the competence and ability of the Court which decided the SEC action. To claim a right to duplicative subsequent hearings simply because the first hearing of the identical facts was in an equity proceeding, injects a belief that the equity hearing

* For a similar acceptance that the policy favoring jury trials is derived from and is part and parcel of the Seventh Amendment, see, Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525, 537-539, rehearing denied, 357 U.S. 933 (1958); Wright & Miller, Federal Practice and Procedure: Civil § 2306 (1971).

was unfair and unreliable. This is the logical extension of appellees' argument, and were such in actuality the case, the entire basis of collateral estoppel and res judicata would be defeated and the power of equity jurisdiction would be severaly and unjustifiably diminished.

> . . . it would be just as unfair to allow an equitable judgment to be the basis of res judicata or collateral estoppel in the two-party situation if this assumption were correct. Thus the policy that seeks to support the McCook principle requires extending the case to situations where its application would be intolerable. Id. at 373.

The authors conclude that the adoption of the suggestion made by appellees of a policy independent of the Seventh Amendment favoring jury trials, promotes other diseconomies and ". . . encourages relitigation where the Constitution does not require it." Id. at 373.

CONCLUSION

The issue to be decided by this Court is clear. Are appellees, who have had a full and fair adjudication, in a three-day trial, of the factual issues presented in the instant action, entitled to relitigate those issues? For the reasons herein stated and in plaintiff's main brief, it is respectfully submitted that relitigation is not required, the court below improperly denied plaintiff's motion

for summary judgment and the question certified to this court should be answered in the affirmative.

Respectfully submitted,

KASS, GOODKIND, WECHSLER & GERSTEIN
Attorneys for Plaintiff-Appellant

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Stuart D. Wechsler
Samuel K. Rosen
Patricia I. Avery

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

Danilo A. Henry, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 661 Greene ave. Brooklyn N.Y. 11221.

That on the 5th day of July, 1977, deponent personally served the within Reply Brief for Appellant upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 3 true copies of same with a duly authorized person at their designated office.

~~By depositing~~ _____ ~~true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

JACOBS, PERSINGER & PARKER
Attorneys for Respondents
70 Pine Street
New York, New York

Danilo A. Henry

Sworn to before me this
5th day of July, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979